Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition of Qwest Corporation for Forbearance	)	WC Docket No. 09-135
Pursuant to 47 U.S.C. § 160(c) in the Phoenix,	)	
Arizona Metropolitan Statistical Area	)	

COMMENTS OF EARTHLINK, INC. AND NEW EDGE NETWORK, INC.

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INTRODUCTION AND SUMMARY

EarthLink, Inc. ("EarthLink") and its competitive local exchange carrier ("CLEC") subsidiary, New Edge Network, Inc. ("New Edge"), hereby submit these comments in response to the Public Notice seeking comment on the adoption of a more traditional market-power analysis in considering incumbent local exchange carrier ("ILEC") forbearance petitions.[1] Specifically, the Federal Communications Commission ("Commission" or "FCC") asks for input regarding the use of a market-power oriented approach as suggested by the FTC-DOJ Horizontal Merger Guidelines ("DOJ-FTC Horizontal Merger Guidelines").[2]

EarthLink's Business Solutions division ("EBS"), together with New Edge, provides communications solutions to small- and medium-sized enterprise businesses. As a market participant providing enterprise business services, EarthLink and its subsidiary, New Edge, have a strong interest in maintaining the availability of unbundled network elements ("UNEs"), as defined under the FCC rules, at just and reasonable rates. New Edge purchases IP transmission

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1 *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, Public Notice, WC Docket No. 09-135 (rel. Apr. 15, 2010).

2 U.S. Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines (1992, revised 1997), http://www.justice.gov/atr/public/guidelines/hmg.pdf ("FTC-DOJ Horizontal Merger Guidelines").

services from UNE-based CLECs to reach end-user customers and provide them with unique networking solutions that reduce costs, improve communications, and increase productivity. Thus, New Edge – and the small- and medium-sized businesses it serves – relies on the continued availability of UNE loops and transport at cost-based stable prices.

EarthLink acknowledges that use of a market-power approach based on the DOJ-FTC Horizontal Merger Guidelines, and similar to the competitive analysis the Commission has undertaken in evaluating transfers of control, is a departure from the FCC's prior methodology for evaluating UNE forbearance requests. However, the FCC can apply a new approach provided that it provides a satisfactory explanation for why it has changed its approach.[3] In its forbearance decisions, the FCC's failure to apply a market-power analysis, including specifically refusing to define relevant product markets, has led to undisciplined decision making, particularly with respect to enterprise markets. For example, in none of its Section 10 forbearance decisions addressing Section 251(c)(3) unbundling requirements did the Commission ever explain how facilities-based alternatives to 75% of all customer locations[4] –

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[3] *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *cf. Verizon v. FCC*, 570 F.3d 294, 304 (D.C. Cir. 2009) ("it is arbitrary and capricious for the FCC to apply such new approaches without providing a satisfactory explanation when it has not followed such approaches in the past.").

[4] *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended, for Forbearance from Sections 251(c)(3) and 252(d)(1) in the Anchorage Study Area*, Memorandum Opinion and Order, 22 FCC Rcd 1958 (2006) ("*ACS Anchorage Forbearance Order*"); *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver, Minneapolis-St. Paul, Phoenix, and Seattle Metropolitan Statistical Areas*, Memorandum Opinion and Order, 23 FCC Rcd 11729 (2008) ("*Qwest 4-State Forbearance Order*"); *Petitions of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence and Virginia Beach Metropolitan Statistical Areas*, Memorandum Opinion and Order, 22 FCC Rcd 21293 (2007)("*Verizon 6-State Forbearance Order*"); *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, Memorandum Opinion and Order, 20 FCC Rcd 19415 (2005) ("*Omaha Forbearance Order*").

including both individual residences as well as enterprise locations – could reflect the choices available to enterprise customers if those customers had few if any facilities-based alternatives for the services they sought to procure and the facilities-based alternatives were largely concentrated in the more numerous residential voice locations. Returning to a market-power based analysis patterned on the DOJ-FTC Horizontal Merger Guidelines would better assure that forbearance is only granted when rules are not necessary to ensure that rates, terms and conditions are "just and reasonable and not unjustly or unreasonably discriminatory," not necessary for "the protection of consumers," and "consistent with the public interest," including the impact on competition.[5]

I. THE COMMISSION'S PAST ANALYTICAL FRAMEWORK FOR UNE FORBEARANCE IS FLAWED AND WILL NOT ADEQUATELY DETERMINE WHEN SECTION 10'S PREREQUISTES FOR FORBEARANCE HAVE BEEN MET.

Prior forbearance decisions, which have relied heavily on predictive judgments of potential competition in undefined product markets, have been flawed. In its past forbearance decisions, even though telecommunications markets are undeniably heterogeneous, the FCC has expressly declined to define relevant product markets. As such, forbearance with respect to UNEs used to serve the enterprise market can turn on the amount of competitive residential facilities-based network buildout, without even an evaluation whether the networks are capable of providing substitutable services. Furthermore, unlike the DOJ-FTC Horizontal Merger Guidelines framework, the FCC has made predictive judgments of competitive entry without a complete analysis of the barriers to entry or the timeframe for such entry. A more disciplined approach is needed for the Commission to be able to assure itself that Section 10's requirements for forbearance are truly met, such that the Commission has the obligation to forbear.

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[5] 47 U.S.C. § 160(a), (b).

In conducting its forbearance analysis with respect to Section 251(c)(3) unbundling requirements, the Commission specifically eschewed a market-power analysis based on the DOJ-FTC Horizontal Merger Guidelines. In its UNE forbearance decisions, the Commission "did not define product markets for the purpose of its UNE forbearance analysis,"[6] nor did it then follow through with the other steps of the DOJ-FTC Horizontal Merger Guidelines analysis such as identifying relevant market participants and evaluating whether forbearance would permit the exercise of market power. Instead, the Commission evaluated UNE forbearance requests by looking at a combination of the ILEC's market share in the metropolitan statistical area ("MSA") and, if that dropped below a threshold level, whether 75% of customer locations in a wire center were capable of being served by an alternative facilities-based provider.[7]

The Commission's analytical framework developed through its four UNE forbearance decisions lends itself to some curious potential results. For example, under the approach followed by the FCC to date, EBS, or its CLEC supplier, could potentially lose access to UNE loops if two conditions are met: (1) the ILEC lost a sufficient number of lines in the MSA to residential cable service, and (2) the cable company built out its network to enough residences to constitute 75% of the lines in the wire center, even if there was absolutely no non-UNE-based enterprise service alternative provided by the cable company or anyone else. Moreover, because forbearance with respect to individual wire centers (usually the most dense) in a MSA could eliminate a CLEC's ability to address an entire geographic area, an enterprise customer using a UNE-based CLEC could lose its competitive choice even in wire centers in which forbearance

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6 *ACS Anchorage Forbearance Order*, 22 FCC Rcd at 1966 ¶ 12.

7 *See Qwest 4-State Forbearance Order*, 23 FCC Rcd at 11754 ¶¶ 35-36; *Verizon 6-State Forbearance Order*, 22 FCC Rcd at 21313-14 ¶ 37 n.22, 30.

was not granted if the CLEC, after forbearance, was not left with the ability to serve enough of the market to be viable.

These flaws in the Commission's existing UNE forbearance framework are not merely theoretical, but have been vividly illustrated by the experience in the Omaha MSA after the *Omaha Forbearance Order*.[8] When the Commission issued that Order, the Commission concluded that there was sufficient facilities-based competition to justify forbearance based largely on the fact that Cox's facilities-based service to residential customer locations pushed the percentage of customer locations with alternative facilities-based service in the wire center over the 75% benchmark.[9] The FCC also made "a predictive judgment, based on previous experience in the market for wireline local exchange service served by Qwest and in other markets, that Qwest will not react to [the FCC's] decision here by curtailing wholesale access to its analog, DS0-, DS1-, or DS3-capacity facilities,"[10] thereby curtailing competitive choices from carriers using those facilities to provide a competing service. As detailed in Earthlink's comments in the Omaha docket, however, shortly after the *Omaha Forbearance Order*, Qwest curtailed wholesale access to its analog, DS0-, DS1-, and DS3-capacity facilities by refusing to make those facilities available on commercially reasonable terms in the core wire centers within the Omaha MSA.[11] The result has been a reduction of competitive alternatives for enterprise customers in the Omaha MSA: McLeodUSA Telecommunications Services, Inc. ("McLeod"), the largest facilities-based CLEC in Omaha, petitioned to withdraw from the Omaha market altogether, and without the

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8 *Omaha Forbearance Order*, 20 FCC Rcd 19415.

9 *Id.*, 20 FCC Rcd at 19450-51 ¶ 69.

10 *Id.*, 20 FCC Rcd at 19455 ¶ 79.

11 *See* Comments of EarthLink, Inc. and New Edge Network, Inc. at 1, WC Docket No. 04-223 (filed Aug. 29, 2007); *see also* Opposition of PAETEC Holding Corp. at 38-43, WC Docket No. 09-135 (filed Sept. 21, 2009).

UNE unbundling requirements New Edge saw Qwest rates for the loop facilities on which it relies rise substantially. [12]

From a statutory perspective, it is critical for the Commission to define Section 10's forbearance criteria in an analytically precise way because once these very limited criteria are met, forbearance is not discretionary, but mandatory. Because the Commission's current analysis deliberately eschews an analysis of market power, the Commission cannot be sure whether the statutory criteria have been met. Section 10(a)(1), for example, establishes that before the Commission can be required to forbear from enforcing its regulations, the Commission must determine that enforcement is "not necessary to ensure that the charges, practice, classifications, or regulations" imposed on a carrier are "just and reasonable and not unjustly or unreasonably discriminatory.[13] Yet, when a carrier has the ability to exercise market power – even if it is not a monopolist – it has the ability to "profitably maintain prices above competitive levels for a significant period of time"[14] by imposing a "small but significant nontransitory price increase" without losing customers to other products.[15] Supra-competitive prices are unjust and unreasonable by definition, are not constrained by market forces, and may bear no relationship to the costs of providing service, a hallmark of "just and reasonable" prices. The Commission has never, in its current framework, explained how a carrier with sustainable market power meets the just and reasonable rates requirement. Similarly, a carrier with market power may also impose unjustly and unreasonably discriminatory prices, whereas "an absence of market power will ordinarily preclude firms of any kind from engaging in price

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[12] *Id.*

[13] 47 U.S.C. § 160(a)(1).

[14] FTC-DOJ Horizontal Merger Guidelines at 2, § 0.1.

[15] *Id.* at 5, § 1.0.

discrimination."[16] In evaluating market power, the Commission should not ignore the potential for coordinated as well as unilateral effects, such as when cable or a single competitor is the only real source of facilities-based competition to the incumbent, and UNEs constrain that market power.[17] The Commission has previously found that mergers that reduce the number of market participants even from three to two raise substantial risks of coordinated effects and the loss of innovation and service quality.[18] The Federal Trade Commission and the Department of Justice have similarly found that duopoly increases the risk that remaining firms will increase prices above competitive levels, especially in markets with high barriers to entry.[19]

Again, the current framework cannot adequately differentiate when the market can produce justly and unreasonably discriminatory rates, terms, and conditions, and when it will not. Without a complete market-power analysis, the FCC is without a sound basis on which to

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[16] *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 239 (1994).

[17] FTC-DOJ Horizontal Merger Guidelines at18-19, § 2.1.

[18] *See Application of EchoStar Communications Corporation, General Motors Corporation, and Hughes Electronics Corporation; (Transferors) and EchoStar Communications Corporation; (Transferee)*, Hearing Designation Order, 17 FCC Rcd 20559, 20624-26 ¶¶ 170-77 (2002). *See also Amendment of the Commission's Space Station Licensing Rules and Policies*, First Report and Order and Further Notice or Proposed Rulemaking in IB Docket No. 02-34 and First Report and Order in IB Docket No. 02-54, 18 FCC Rcd 10760, 10789 ¶ 64 (2003) ("[W]e find that the factors that have led courts to disfavor mergers to duopoly also support establishing a procedure that will maintain at least three competitors in a frequency band, unless an interested party can rebut our presumption that three is necessary to maintain a competitive market.").

[19] *See Fed. Trade Comm'n v. H.J. Heinz Co.*, 246 F.3d 708, 725 (D.C. Cir. 2001) (approving FTC's rejection of a merger that would result in a duopoly market); *FTC v. Staples*, 970 F. Supp. 1066, 1081 (D.D.C. 1997) (finding markets were highly concentrated where the number of "office superstore competitors" dropped from three to two); *United States v. Worldcom, Inc. and Sprint Corp.*, Complaint, ¶¶ 62, 70, 90, 107 (June 26, 2000) (Complaint filed by DOJ to block the merger between Worldcom, Inc. and Sprint Corp. where the merger would result in an effective duopoly); United States Dept. of Justice Antitrust Div. and Federal Trade Commission, 1992 Horizontal Merger Guidelines, 57 Fed. Reg. 41552, § 0.1 (1992) ("where only a few firms account for most of the sales of a product, those firms can exercise market power, perhaps even approximating the performance of a monopolist . . .").

determine whether regulation is necessary to ensure just and reasonable prices, terms, and conditions, or to protect consumers.

Similarly, section 10(b) requires consideration of the impact of forbearance on competitive market conditions, which is a fundamental concern of the DOJ-FTC Horizontal Merger Guidelines. Creating a comprehensive portrait of the "competitive conditions" in a given market – both before and after forbearance (or merger)—— is fundamental to the underlying policy of the DOJ-FTC Horizontal Merger Guidelines.[20] The potential adverse effect of forbearance (or merger) is the subject of the second part of the DOJ-FTC Horizontal Merger Guidelines' analysis.[21] Application of the DOJ-FTC Horizontal Merger Guidelines will meet the Section 10(b) requirement that the "Commission shall consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions."[22]

II. A PROPER ANALYTICAL APPROACH TO FORBEARANCE WOULD FOLLOW THE DOJ-FTC HORIZONTAL MERGER GUIDELINES.

A market-power analysis based on the FCC's transaction decisions and the DOJ-FTC Horizontal Merger Guidelines would be a major step toward remedying the odd results in the framework developed in the four previous UNE forbearance decisions, and reintroducing analytical discipline. This form of analysis is not foreign to the Commission. Indeed, the Commission has used this more structured market-power approach in its evaluation of the mergers of AT&T and BellSouth,[23] Verizon and MCI,[24] and SBC and AT&T.[25] Applying a

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[20] FTC-DOJ Horizontal Merger Guidelines at 1, § 0.

[21] *Id.* at 18, ch. 2.

[22] 47 U.S.C. § 160(b).

[23] *AT&T Inc. and BellSouth Corporation, Application For Transfer of Control*, Memorandum Opinion and Order, 22 FCC Rcd 5,662 (2007) ("*AT&T/BellSouth Merger Order*").

market-power analysis informed by the DOJ-FTC Horizontal Merger Guidelines will harmonize the FCC's forbearance review with its analysis in mergers and other competitive evaluations.

The DOJ-FTC Horizontal Merger Guidelines evaluate market power – i.e., whether a provider may be able to increase price by a small but significant and nontransitory amount[26] – by establishing product and geographic markets, evaluating the competitiveness of the relevant markets, and identifying competitors.

Further, in the FCC's Section 10 analysis, present competition must necessarily play a larger role than the promise of potential competition. Section 10(a)(1) requires prices to be "just and reasonable" in the present, future events notwithstanding. In *Verizon*, the D.C. Circuit also noted that it may "be reasonable for the FCC to consider only evidence of actual competition rather than actual and potential competition."[27]

A. Product Market Definition

The DOJ-FTC Horizontal Merger Guidelines state that "a product or group of products can be defined as a market if "a hypothetical profit-maximizing firm that was the only present and future seller of those products ('monopolist') likely would impose at least a 'small but significant and nontransitory' increase in price."[28] Such a price increase could only be maintained if similar

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[24] *Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, 20 FCC Rcd 18333 (2005) ("*Verizon/MCI Merger Order*").

[25] *SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, 20 FCC Rcd 18290 (2005) ("*SBC/AT&T Merger Order*").

[26] FTC-DOJ Horizontal Merger Guidelines at 6-10, §§ 1.1-1.2.

[27] *Verizon*, 570 F.3d 294, 304 (2009).

[28] FTC-DOJ Horizontal Merger Guidelines at 6, § 1.11. *See also Verizon/MCI Merger Order*, 20 FCC Rcd at 18446 n.82 (citing the FTC-DOJ Horizontal Merger Guidelines at 6-8, §§ 1.11, 1.12).

products could not function as a reasonable substitute. If there is such a substitute, the product market is defined too narrowly. This is a critical analytical step in many markets, but particularly in telecommunications markets because the products, and consumers demand for those products are heterogeneous. The Department of Justice recently underscored this point with respect to broadband markets, but it is true of telecommunications markets more generally as well.[29] The FCC's prior forbearance analysis, however, deliberately ignored this heterogeneity. For example, in its *ACS Anchorage Forbearance Order*, the Commission expressly refused to consider the difference between residential and businesses services provided over a loop.[30] This conflates non-substitutable products which can lead to forbearance even when the statutory criteria are not met.

Using this definition, in EarthLink's experience, the following comprise separate and distinct product markets.

Residential and business services. As other commenters have noted, and as the Department of Justice noted with respect to broadband services, the Commission must differentiate between residential and business services.[31] The basic characteristics of residential and business services differ entirely in terms of price, service characteristics, cost of providing service, and required level of reliability, among other factors. For example, the business customers that New Edge serves need a provider that can serve all of their locations affordably while providing reliable and flexible high-speed network access. The cost and service differences between residential and commercial services prevent either from acting as a

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[29] *Ex Parte* Submission of the Department of Justice at 5, GN Docket No. 09-51 (filed Jan. 4, 2010) ("DOJ Ex Parte").

[30] *ACS Anchorage Forbearance Order*, 22 FCC Rcd at 1966-67 ¶ 13.

[31] *See* Opposition of CBeyond, Integra, One Communications, and tw telecom at 7-8, WC Docket Nos. 06-172 & 07-97 (filed Sept. 21, 2009) ("Integra Opposition"); Comments of PAETEC Holding Corp. at 43, WC Docket No. 07-97 (filed Sept. 21, 2009); DOJ Ex Parte at 5.

reasonable substitute for the other. Residential and commercial services are therefore in different product markets.

Voice and data services. As should be self-evident, voice and data services are not substitutable products in and of themselves. As the Department of Justice highlighted in its comments prior to the National Broadband Plan, different broadband products have varying speeds and other characteristics support different ranges of applications.[32] A low speed (200-300 kbps) service, for example, would not support streaming video, and thus is unlikely to be an acceptable substitute for – and therefore in the same product market as – a multimegabit broadband service.[33]

Mobile and fixed services, especially with respect to business services. For most enterprise customers, mobile options supplement, rather than replace, traditional wireline services. Even small and medium enterprises need more complex voice and data service packages and multipoint networks that cannot be provided over general mobile wireless services. Although a subgroup of consumers maintains cell-phone-only households, mainly in the residential market, mobile services are not yet an adequate substitute for many users. The Department of Justice has concluded that mobile services are not a substitute for wireline services for most consumers,[34] and has recently affirmed that although wireless broadband might someday "discipline the behavior of the established wireline [broadband] providers," that day

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[32] DOJ 5-6.

[33] *See id.* at 5.

[34] *See* U.S. Department of Justice, Voice, Video and Broadband: The Changing Competitive Landscape and its Impact on Consumers (2008), http://www.usdoj.gov/atr/public/reports/239284.pdf; Letter from Brad E. Mutschelknaus, Counsel to Broadview Networks, Inc. *et al*, to Marlene H. Dortch, Secretary, Federal Communications Commission at 2, WC Docket Nos. 08-24 and 08-49 (filed Apr. 20, 2009); Letter from Thomas Jones, Counsel to One Communications Corp. *et al*, to Marlene H. Dortch, Secretary, Federal Communications Commission at 7-11, WC Docket Nov. 08-24 (filed Dec. 3, 2008).

has not yet come.[35] Furthermore, the FCC's own precedent correctly requires it to include the market share of the ILEC's wireless affiliates in ILEC's own market share because the wireless affiliate has an incentive to act in concert with the wireline carrier in order to protect its wireline customer base from intermodal competition.[36]

Wholesale and retail services. The FCC has considered wholesale and retail services as separate and distinct product markets in the past,[37] and should unquestionably do so here. The products available in the wholesale markets, DS0-, DS1-, and DS3-capacity facilities – both channel terminations and transport – have no counterpart in the retail market.

B. Geographic Market Definition

Per the DOJ-FTC Merger Guidelines and its merger precedent, the FCC should begin by looking at areas of similar competitive choices to determine the proper geographic market. The merger guidelines define "the geographic market to be a region such that a hypothetical monopolist that was the only present or future producer of the relevant product at locations in that region would profitably impose at least a 'small but significant and nontransitory' increase in price, holding constant the terms of sale for all products produced elsewhere."[38] In its merger precedent, the Commission has repeatedly made clear that the relevant geographic market for a market-power analysis is "a particular customer's location, since it would be prohibitively expensive for an enterprise customer to move its office location in order to avoid a 'small but

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35 DOJ Ex Parte at 10.

36 *Verizon 6-State Forbearance Order*, 22 FCC Rcd at 21324.

37 *See AT&T/BellSouth Merger Order*, 22 FCC Rcd at 5676-79 ¶¶ 27-33; *SBC/AT&T Merger Order*, 20 FCC Rcd at 18304-21 ¶¶ 24-55; *Verizon/MCI Merger Order*, 20 FCC Rcd at 18447-63 ¶¶ 24-55.

38 FTC-DOJ Horizontal Merger Guidelines at 8-9, § 1.21.

significant and nontransitory' increase in the price."[39] The Commission then for convenience aggregates together areas of similar competitive alternatives.[40] This approach recognizes that products and competitors that may be present in one part of a MSA may not be available to constrain prices throughout the entire MSA.[41]

EarthLink also agrees with Integra that, in order to fully evaluate the impact of forbearance on competition and the public interest, the Commission must also consider whether forbearance on a patchwork basis within a larger geographic region (such as an MSA) would undermine competition in the portions of the MSA with little facilities competition by eliminating a substantial portion of the market.[42] This is the fundamental lesson from developments in Omaha. Whether styled as a geographic market issue or a market participants/competitive effects issue,[43] the Commission cannot reasonably ignore the fact that granting forbearance in a portion of a broader marketing region may foreclose UNE competition over that broader region and not just in the area for which forbearance was granted. This expansive impact of forbearance even in a limited number of wire centers can especially be seen

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[39] *See, e.g., Verizon/MCI Merger Order*, 20 FCC Rcd at 18449-50 ¶ 28; *id.*, 20 FCC Rcd at 18466-67 ¶ 62; *SBC/AT&T Merger Order*, 20 FCC Rcd at 18307 ¶ 28; *id.*, 20 FCC Rcd at 18324-25 ¶ 62.

[40] *See, e.g., Verizon/MCI Merger Order*, 20 FCC Rcd at 18449-50 ¶ 28; *id.*, 20 FCC Rcd at 18466-67 ¶ 62; *SBC/AT&T Merger Order*, 20 FCC Rcd at 18307 ¶ 28; *id.*, 20 FCC Rcd at 18324-25 ¶ 62; *NYNEX Corporation Transferor, - and - Bell Atlantic Corporation Transferee, For Consent to Transfer Control of NYNEX Corporation and Its Subsidiaries*, Memorandum Opinion & Order, 12 FCC Rcd 19985, 20,015 ¶ 51 (1997).

[41] *Verizon/MCI Merger Order*, 20 FCC Rcd at 18,450 ¶ 28; *AT&T/BellSouth Merger Order*, 22 FCC Rcd at 5,678 ¶ 31.

[42] Integra Opposition at 8.

[43] *See* FTC-DOJ Horizontal Merger Guidelines at 28-29, § 3.3 (discussing the relationship of minimum viable scale to the likelihood of entry).

with respect to service to the types of enterprises served by EBS and New Edge, which typically need to procure multisite regional networks connecting their stores or offices.

C. Properly Identify Competitors

Finally, under the DOJ-FTC Horizontal Merger Guidelines market-power analysis, the Commission must properly identify competitors in each of the relevant markets. First, the Commission should include as competitors those carriers that currently participate in the relevant product and geographic markets.[44] For example, it makes little sense to include a cable company as a participant in the enterprise market if the cable company is not offering enterprise services in a particular area. Nonetheless, that was the practical effect of the FCC's prior analysis focusing on facilities-based service to 75% of customer locations in a wire center, irrespective of whether those locations were residential or enterprise services demanding dissimilar services.

Second, the DOJ-FTC Horizontal Merger Guidelines provide a more rigorous approach to considering potential entry. Under the DOJ-FTC Horizontal Merger Guidelines, potential entry is considered, but only if it can be expected to be timely – usually less than two years[45] – and likely.[46] In the *Omaha Forbearance Order*, the Commission dismissed, virtually without analysis of the barriers to network expansion and extension, the fact that the cable company had a limited ability to reach enterprise customers with its own facilities.[47]

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[44] *Id.* at 11, § 1.31.

[45] *Id.* at 27-28, § 3.2.

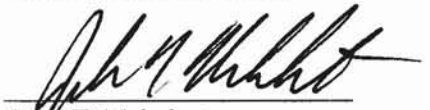
[46] *Id.* at 28-29, § 3.3.

[47] *Omaha Forbearance Order*, 20 FCC Rcd at 19448 n.174.

CONCLUSION

The Commission should apply a market-power oriented approach to determine whether Section 10 forbearance is justified. A proper market-power approach will follow the competitive principles described in the FTC-DOJ Horizontal Merger Guidelines. Such an approach is necessary to remedy problems with previous forbearance analyses.

Respectfully submitted,



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